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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
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	)	
Rules and Policies on Foreign Participation	)	IB Docket No. 97-142
in the U.S. Telecommunications Market	)	
	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

MCI Telecommunications Corporation ("MCI"), pursuant to Section 1.429(f) of the Commission's Rules, hereby replies to the Petitions for Reconsideration of the Commission's Report and Order in this proceeding.[1]

I. Introduction and Background

On November 26, 1997, the Commission released the *Foreign Participation Order*, which adopts new policies and rules governing the entry of foreign carriers or their affiliates into the U.S. international services market. On January 8, 1998, seven parties, including MCI, filed Petitions for Reconsideration of the *Foreign Participation Order*.[2] MCI herein replies to certain issues raised in the Petitions filed by KDD, SBC, BellSouth, and PanAmSat. Specifically, MCI opposes petitioners' suggestions that the Commission reconsider its: (1) presumption that foreign

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[1] *Rules and Policies on Foreign Participation*, IB Docket No. 97-142, Report and Order, FCC 97-398 (rel. Nov. 26, 1997) ("*Foreign Participation Order*" or "*Order*").

[2] Petitions were filed by Aeronautical Radio, Inc., BellSouth Corporation ("BellSouth"), Kokusai Denshin Denwa Co. Ltd. ("KDD"), MCI Telecommunications Corporation, PamAmSat Corporation ("PanAmSat"), SBC Communications Inc. ("SBC"), and J. Gregory Sidak.

carriers with more than 50 percent market share in their home markets have market power; (2) dominant carrier safeguards; (3) decision to apply the new rules for foreign carrier entry into the U.S. market to investments made by U.S. carriers in foreign carriers; and (4) failure to align the Section 271 public interest test governing Bell Operating Company ("BOC") entry into the in-region interLATA market with the standard for entry of foreign-affiliated carriers into the U.S. market.

II. The Commission Should Reject Petitioners' Requests that it Reconsider its Policies Regarding Dominant Carrier Status

In the *Foreign Participation Order*, the Commission adopted a presumption in favor of entry into the U.S. market for applicants whose affiliates are from WTO member countries. The Commission held, however, that it would apply certain reporting and structural safeguard requirements on, as well as prohibit special concessions with, authorized foreign-affiliated carriers it classifies as dominant.[3] The Commission established a rebuttable presumption that a foreign carrier with 50 percent or more market share in international transport, inter-city, or local access facilities or services on the foreign end of the U.S. international route has sufficient market power to affect competition adversely in the U.S. market and will be treated as dominant.[4]

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[3] *See Foreign Participation Order* at ¶¶ 252-286. The Commission also reserved the right to impose additional safeguards on carriers with foreign affiliates that pose a high risk to competition in the U.S. international services market. *Id.* at ¶ 51.

[4] *Id.* at ¶¶ 143-49, 161-62.

A. The Commission Should Not Reconsider its Definition of Market Power for Determining Dominant Carrier Status

KDD argues in its petition that the Commission should reconsider and modify its market power test by establishing a rebuttable presumption that a foreign carrier lacks market power if the carrier does not control bottleneck local exchange facilities, is subject to competition from multiple facilities-based carriers that possess the ability to terminate international traffic, and serves customers at the foreign end of the route, and is from a WTO country.[5]

The Commission should reject KDD's proposal.[6] KDD claims that the Commission should modify its market power test because the only "bottleneck" control possible in an international services market characterized by open entry is with respect to local facilities. KDD maintains that bottlenecks in international transport facilities or services will be quickly eroded by new entrants. KDD offers no support for its conclusion that international transport bottlenecks will quickly disappear. Moreover, KDD ignores the fact that the Commission sought to avoid adopting an overly burdensome market power presumption.[7] If KDD believes that its circumstances are unique, it should have no problem rebutting the presumption of market power in order to avoid dominant carrier regulation.[8]

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[5] KDD Petition at 6.

[6] We note here that neither KDD nor any other party proposed the test that KDD now asks the Commission to adopt on the record in the proceeding. Although MCI addresses KDD's arguments, it believes that KDD's suggested modification is outside of the scope for reconsideration in this proceeding.

[7] *See Foreign Participation Order* at ¶¶ 159-160.

[8] *See Id.* at ¶ 233.

B. The Commission's Dominant Carrier Safeguards Are Consistent With GATS

KDD also argues that, if the Commission does not adopt KDD's modified market share test, it should eliminate the dominant carrier safeguards completely because such safeguards violate the GATS National Treatment principle.[9] As discussed above, KDD's first line of argument is that the Commission should adopt a market power test designed to remove dominant carrier restrictions from KDD while retaining them for many other foreign-affiliated carriers in the U.S. market. Remarkably, its second line of argument is that if the Commission will not modify the test for dominance (thereby exempting KDD), such safeguards are inconsistent with GATS and should be eliminated.

More importantly, KDD's argument that applying dominant carrier safeguards only to U.S. carriers with foreign affiliates violates the National Treatment principle completely misapprehends the application of that principle. The National Treatment principle obligates a WTO member to treat like services and service suppliers from other WTO members no less favorably than it treats its own services and service suppliers. As the Commission explained, the dominant carrier safeguards distinguish among carriers not on the basis of nationality, but on objective economic analysis (*i.e.* market power and the ability to distort competition in the U.S. international services market).[10] Dominant carrier safeguards thus apply to both domestic and foreign-affiliated carriers based only on impartial criteria. The Commission should therefore reject KDD's GATS argument.

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9 KDD Petition at 10.

10 *Foreign Participation Order* at ¶ 374.

C. The Commission Should Not Reconsider its Generally Applicable Dominant Carrier Safeguards

In its Petition, PanAmSat urges the Commission to reconsider its decisions: (1) to reduce the tariff notice period for foreign-affiliated dominant carriers to one day from 14 days, and to allow such tariffs to be filed without cost support,[11] and (2) to eliminate the prior approval requirement for circuit additions or discontinuations on routes where a foreign-affiliated carrier is dominant.[12] MCI does not agree that these safeguards should apply to all carriers regulated as dominant in the U.S. international services market. However, MCI believes that these conditions, among others, may be appropriate in circumstances where entry by a foreign-affiliated carrier poses a high risk to competition in the U.S. international services market, and that risk cannot be addressed by the safeguards that apply to all dominant carriers.

III. The Commission Should Reject Petitioners' Requests that it Reconsider its New Foreign Carrier Entry Standards

A. The Commission Correctly Held that U.S. Carrier Investments in Foreign Carriers Should be Treated the Same as Foreign Carrier Investments in U.S. Carriers

SBC urges the Commission to reconsider its decision to treat U.S. carrier investments in foreign carriers in the same manner that it will treat foreign carrier investments in U.S. carriers. Specifically, SBC claims that the Commission's "new policy" requiring prior approval of U.S. investments abroad would create competitive disadvantages for U.S. carriers bidding for foreign carriers because under most privatizations, investors are required to submit "unconditional"

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11 PanAmSat Petition at 2-4.

12 *Id.* at 4-5.

bids.[13] SBC asserts that a more appropriate rule would address the conditions under which the acquiring U.S. carrier offered its services between the United States and the foreign destination in which it invests.[14]

SBC has misinterpreted the Commission's finding. The Commission modified its rules to require authorized U.S. international carriers (*i.e.* carriers that have Section 214 authority) to notify the Commission of their acquisition of a controlling interest in a foreign carrier.[15] The Commission asserted no authority to examine all investments of U.S. carriers abroad. Indeed, the Commission simply preserved its ability to identify new foreign affiliations that warrant application of its new Section 214 rules -- precisely what SBC suggests would be the more appropriate standard. If a U.S. carrier wishes to invest in a foreign market that it has Section 214 authority to serve, the Commission reserves the right to examine not the investment *per se*, but the potential for competitive distortion in the United States that may arise from the creation of a foreign affiliation on the route. SBC's requested modification is therefore unwarranted and should be rejected.

B. BellSouth's Effort to Force Artificial Consistency Between BOC in-region interLATA Entry and Foreign Carrier Entry Is Misguided and Should Be Rejected

In its petition, BellSouth argues that the Commission should treat BellSouth the same as foreign carriers since both have market power over local exchange services in their home

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13 SBC Petition at 3.

14 *Id.*

15 *See* 47 C.F.R. § 63.11(b) as amended. *See also Foreign Participation Order* at ¶ 334.

markets.[16] Because of the differences between the Telecommunications Act of 1996 ("1996 Act") and the differing legal framework applicable to foreign carriers, BellSouth emphasizes that each of these legal frameworks contains a public interest standard and argues that the Commission must always apply a public interest test in an identical fashion -- without regard to the underlying legal schemes, the parties involved, or the particular circumstances.

BellSouth is essentially seeking once again to reassert arguments that it made and lost in Congress, requesting that it be allowed to offer in-region long distance service without satisfying a meaningful public interest test. BellSouth's petition needs no more response than this: having failed to convince Congress, BellSouth must now live within the law, including the public interest test and other detailed requirements of Section 271 of the 1996 Act, which do not apply to foreign carriers. Instead, foreign carrier entry into the United States is governed by Sections 214 and 310 of the Communications Act, which is a more general regime designed to encourage foreign jurisdictions to privatize and open their markets to competitive forces. The *Foreign Participation Order* is based on the progress towards that goal established by the WTO Basic Telecom Agreement which achieved market-opening commitments from the trading partners of the United States to open telecommunications markets around the world to competition.

While other countries may use a variety of means to open their domestic markets to competition, Section 271 and other provisions of the 1996 Act are the means chosen by the United States, which remain fully applicable to BellSouth and other BOCs. BellSouth fails to recognize that the major thrust of Section 271 is to provide an incentive to the BOCs to open

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[16] BellSouth Petition at 2-4.

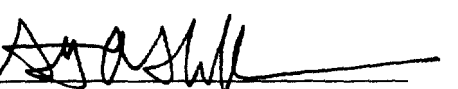
local markets in their regions to competition. Even if BellSouth were correct that its immediate entry would be desirable for the long distance market, such entry still would not be in the public interest until irreversible competition exists in BellSouth's local markets. For these reasons, BellSouth's petition should be denied.

V. Conclusion

For the reasons set forth herein, MCI submits that the Commission should reject the Petitions for Reconsideration filed by KDD, SBC, BellSouth and PanAmSat that urge the Commission to modify the entry standards for and safeguards applicable to foreign carriers in the U.S. international services market.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION



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February 10, 1998

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I, Deborah A. Fairley, do hereby certify that a copy of the foregoing Opposition to Petitions for Reconsideration was hand delivered or sent by first class United States mail, postage paid on this 10th day of February, 1998, to the following:

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